

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

A. O. ANDERSEN COMPANY, a Corporation,
Claimant of 1974 Cases Canned Salmon
Labelled in Part "Hypatia Brand Pink Sal-
mon" Shipped by ALASKA HERRING &
SARDINE COMPANY CANNERY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

SEP 5 - 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

A. O. ANDERSEN COMPANY, a Corporation,
Claimant of 1974 Cases Canned Salmon
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Plaintiff in Error,
310 Federal Building, Seattle, Washington.
JUDSON F. FALKNOR, Esq., Assistant United States Attorney, Attorney for Plaintiff in Error,
310 Federal Building, Seattle, Washington.
Messrs. KERR, McCORD & IVEY, Attorneys for Defendant in Error,
1309 Hoge Building, Seattle, Washington.

[1*]

United States District Court, Western District of
Washington, Northern Division.

November Term, 1920.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES CANNED SALMON Labeled in Part
"Hypatia Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery.

Libel of Information.

To the Honorable Court Above Named:

The United States of America, by Robert C. Saunders, United States Attorney for the Western District of Washington, respectfully shows:

*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That libelant above named, in its own right, prays for the seizure and condemnation of certain articles which may be used either as a food or as a drug, to wit: 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon".

II.

That libellant is informed and believes and therefore alleges that the said 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" have been shipped from Port Walter, Alaska, to the City of Seattle, in the State of Washington, via Apex Fish Company Motor Ship and reshipped via steamer "Wakina", arriving at Seattle on or about August 7th, 1920, in interstate commerce via said steamers, which said shipment is now in the same condition in which it was shipped from Port Walter, Alaska, to Seattle, in the Northern Division of the Western District of Washington, and has always remained since said shipment in the same condition in which it is now. [2]

III.

That libelant is informed and believes, and upon such information and belief alleges, that the said 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" are adulterated, under the provisions of Section 7, Food and Drug Act, paragraph Sixth, under Food, of the Act of Congress of June 30, 1906, known as the Food and Drug Act, in that they consist wholly or in part of filthy, decomposed and putrid animal substance.

IV.

That said 1974 Cases Canned Salmon Labeled in

Part "Hypatia Brand Pink Salmon" constituted interstate shipments from Port Walter in the Territory of Alaska, to Seattle, in the State of Washington, in interstate commerce, as above set forth, and that the above described salmon is now within the jurisdiction of this Honorable Court in the original unbroken packages.

V.

That the source of libellant's information is an official communication by wire received from the Acting Secretary of Agriculture under date January 22d, 1921, which said communication is hereto attached by copy and made a part of this libel, marked Exhibit "A" and made a part hereof as though set out in full.

WHEREFORE, in consideration of the premises, your libellant prays that said articles which may be used either as a food or as a drug, consisting of 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" may be proceeded against and seized for condemnation in accordance with Act of Congress approved June 30, 1906, and to this end this Honorable Court may issue the process of attachment in due process of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, as far as practicable in this case, and that all persons, firms and corporations, having or pretending to have, any right, title or claim in and to said shipment of salmon, which may be used either as a food or as a drug, above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that if the said

persons, firms or corporations cannot be found, they may be cited to appear by process of publication [3] in the manner provided by law;

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food and drug hereinbefore particularly described and mentioned, be condemned at the suit of this libellant, according to the provisions of the Act of Congress hereinbefore set forth, that this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises, and may grant your libellant a decree for the costs of this proceeding against the owners or holders of said articles condemned, should such costs not be justified out of the proceeds of the sale, and that your libellant may have such other and further relief as the nature of the case may require.

ROBT. C. SAUNDERS,

United States Attorney.

CHARLOTTE KOLMITZ,

Assistant United States Attorney. [4]

United States of America,
Western District of Washington,
Northern Division,—ss.

Edward A. McDonald, being first duly sworn, upon his oath deposes and says: That he is inspector in the Bureau of Chemistry, United States Department of Agriculture, at Seattle, Washington; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein

stated on information and belief and that as to those matters he believes it to be true.

EDWARD A. McDONALD,

Subscribed and sworn to before me this 24th day of January, 1921.

[Seal]

FRANK L. CROSBY, JR.,

Deputy Clerk, U. S. District Court, Western District of Washington. [5]

Exhibit "A."

Washington DC 540 pm Jan 22 1921

Saunders

United States Attorney Seattle Wn

There are at Seattle possession A O Anderson and Company nineteen hundred and seventy four cases canned salmon labeled part quote 4 dozen 1 pound talls Hypatia Brand Pink Salmon packed for J L Smiley and Company Seattle Washington (can) Hypatia Brand Pink Salmon contents 1 pound packed for J L Smiley and Co Seattle U S A unquote shipped by cannery of Alaska Herring and Sardine Company from Port Walter Alaska between June twenty eight and November seventh ninteen via Apex Fish Company motor ship and reshipped by steamer Wakina about August seventh twenty Examination sample Bureau Chemistry shows nineteen point four per cent cans examined decomposed some putrid tainted or stale product adulterated violation Section seven Food and Drugs Act paragraph sixth under Food in that it consists wholly or in part of filthy decomposed and putrid animal substance Evidence analysis furnished by Arthur W Hansen of interstate shipment Edward

A. McDonald who will call and identify goods Consignment subject seizure and confiscation Section ten Department requests immediate seizure Wire action taken Food and Drugs fourteen two six two.

E D BALL,
Acting Secretary
332 PM.

Filed in the United States District Court, Western District of Washington, Northern Division, January 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

United States District Court for the Western District
of Washington.

No. 5829.

UNITED STATES OF AMERICA

vs.

1974 CASES CANNED SALMON, Labeled in
Part "Hypatia Brand Pink Salmon," Shipped by
Alaska Herring & Sardine Co. Cannery.

Praeceptum for Monition and Attachment.

To the Clerk of the Above-entitled Court:

You will please issue a monition and attachment.

CHARLOTTE KOLMITZ,
Asst. United States Attorney. [7]

No. 5829. United States District Court, Western District of Washington. United States of America, vs. 1974 Cases Canned Salmon, Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska

Herring & Sardine Co. Cannery. Praecepta for Process, etc.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, January 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

No. 5829.

Monition and Attachment.

Western District of Washington,—ss.

The PRESIDENT of the UNITED STATES OF AMERICA to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, a Libel hath been filed in the United States District Court for the Western District of Washington, on the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one, by United States of America, against 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring and Sardine Co. Cannery, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Salmon, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said salmon, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the Libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said salmon and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held at Seattle, Washington, in the Western District of Washington, on the 10th day of February, A. D. 1921, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

WITNESS, the Hon. EDWARD E. CUSHMAN, Judge of said Court, at the city of Seattle, in the Western District of Washington, this 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one and of our independence the one hundred and forty-fifth.

[Seal]

F. M. HARSHBERGER,

Clerk.

By FRANK L. CROSBY, Jr.,

Deputy Clerk.

ROBT. C. SAUNDERS,

Proctor for Libellant. [9]

Office of U. S. Marshal,
Western District of Washington,—ss.

In obedience to the within monition, I attached the 1963 cases salmon therein described, on the 25th day of January, 1921, and have given due notice to all persons claiming the same that this Court will, on the 10th day of February, 1921 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof should no claim be interposed for the same.

Date Jan. 25, 1921.

JOHN M. BOYLE,
U. S. Marshal.
By F. J. COLLIGAN,
Deputy Marshal.

Marshal's Fees and Expenses.

| | |
|--|--------|
| For Serving Attachment and Monition..... | \$2.00 |
| Miles traveled, 4, at 6 cents per mile..... | .24 |
| Preparing Notice of Seizure for posting..... | |
| Preparing Copy of Notice of Seizure for Pub- lisher | |
| Publishing Notice of Seizure, Journal of Com- merce | 3.00 |
| Posting Notice of Seizure | |
| Percentage on \$ at per cent. | |
| Keeper's Fees day at \$2.50 per day.... | |
| Releasing Vessel | |
| <hr/> | |
| Total | \$5.24 |

No. 5829. United States District Court, Western District of Washington, Northern Division. United States of America, Plaintiff, vs. 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery. Monition and Attachment. Issued January 25, 1921. Returnable February 10, 1921. Nature of cause and amount —. Act of June 30, 1906. Robt. C. Saunders, Proctor for Libellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 16, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES CANNED SALMON, etc.,

Respondent.

Claim of A. O. Andersen & Co.

Comes now A. O. Andersen & Co., a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and alleges that it is the owner of all of the salmon referred to in the libel

filed herein and asserts its claim to said salmon and each and every part thereof.

KERR, McCORD & IVEY,
Attorneys for A. O. Andersen & Co.

United States of America,
Western District of *America*,
Northern Division,—ss.

A. B. Natland, being first duly sworn on oath, deposes and says: That he is Seattle Manager of A. O. Andersen & Co., a corporation, the claimant above named; that he has read the foregoing claim; knows the contents thereof and believes the same to be true.

[Seal]

A. B. MATLAND.

Subscribed and sworn to before me this 28th day of January, 1921.

[Notarial Seal] MILLARD P. THOMAS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 5, 1921. F. M. Harshberger. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES CANNED SALMON, Labeled in
Part "Hypatia Brand Pink Salmon," Shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent.

Answer of A. O. Andersen Company.

Comes now the claimant, A. O. Andersen Company,
and answering the libel on file herein, for cause of
answer says:

I.

Answering paragraph I of the libel, this claimant
admits the same.

II.

Answering paragraph II of the libel, this claimant
admits that the salmon therein referred to was shipped
from Alaska, but denies each and every other alle-
gation therein contained.

III.

Answering paragraph III of the libel, this claimant
denies the same and each and every part thereof.

IV.

Answering paragraph IV of the libel, this claimant
admits that the salmon referred to in said paragraph

was purchased by the claimant, but denies each and every other allegation in said paragraph contained.

V.

Answering paragraph V of the libel, this claimant says that it has neither information nor knowledge sufficient to form a belief as to the truth or falsity of the matters and things therein set forth and therefore denies the same and each and [12] every part thereof.

KERR, McCORD & IVEY,
Attorneys for Claimant.

United States of America,
Western District of Washington,
Northern Division,—ss.

F. W. Perry, being first duly sworn, deposes and says: That he is Seattle Manager of A. O. Andersen Company, the claimant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

F. W. PERRY.

Subscribed and sworn to before me this 9th day of February, 1921.

[Seal] MILLARD T. THOMAS,
Notary Public for Washington, Residing at Seattle.

Received a copy of the within answer this 9th day of February, 1921.

ROBT. C. SAUNDERS,
Attorney for Libellant.
By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 9, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in Part
"Hypatia Brand Pink Salmon," Shipped by
Alaska Herring & Sardine Co. Cannery,

Respondent,

A. O. ANDERSON CO., a Corporation,

Claimant.

Demand for Jury.

To the Above-named Claimant and Messrs. Kerr, McCord & Ivey, Its Attorneys:

You and each of you will please take notice that the libelant herein elects to have this cause tried to a jury and hereby demands a jury to try the issues of fact as framed by the pleadings in this cause.

Dated this 16th day of June, 1922.

THOMAS P. REVELLE,

United States Attorney,

JUDSON F. FAULKNER,

Assistant United States Attorney,

Attorneys for Libelant.

Receipt of copy of the above demand is hereby acknowledged this 16th day of June, 1922.

KERR, McCORD & IVEY,
Attorneys for Claimant.
By L. FERGUSON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 16, 1922, F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in part
"Hypatia Brand Pink Salmon," shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent.

Verdict.

We, the jury in the above-entitled cause, find the respondent 1974 Cases Canned Salmon, Labeled in part "Hypatia Brand Pink Salmon" not guilty as charged in the libel of information filed herein, being instructed by the Court so to do.

W. G. POTTS,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in part
"Hypathia Brand Pink Salmon," shipped by
Alaska Herring & Sardine Co. Cannery,

Respondent,

A. O. ANDERSON COMPANY,

Claimant.

Decree.

This cause having come on for hearing and trial before a jury on the 20th day of June, 1922, during the May, 1922, Term of this Court, the United States of America appearing by Mr. Thomas P. Revelle, United States Attorney, and Mr. Judson F. Faulknor, Assistant United States Attorney, for the Western District of Washington, and the A. O. Anderson Company, claimant, appearing by Messrs. Kerr & McCord, and the Government having introduced its evidence in support of the allegations of the libel, and the claimant having moved the Court to direct

the jury to return a verdict of not guilty on the ground that the Government had introduced no evidence that would justify the submission of the case to the jury or introduced no evidence tending to sustain the allegations of the libel, and the Court having granted said motion and the jury having returned a verdict of not guilty in compliance with said instructions by the Court; [16]

WHEREBY, it is ORDERED, ADJUDGED and DECREED that the said libel against the said 1974 Cases Canned Salmon, labeled in part "Hypathia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery, be dismissed; and it is further

ORDERED, that the United States Marshal for the Western District of Washington shall deliver to the said claimant the said 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery.

Whereupon, the libelant duly excepted to the aforesaid order, judgment and decree, which exception is hereby allowed.

Done in open court this 24th day of June, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—KERR & McCORD,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES SALMON.

**Order Extending Time Thirty Days to File Bill of
Exceptions.**

Upon motion of the United States Attorney, it is hereby ordered that the time for filing bill of exceptions in the above-entitled cause may be extended for a period of thirty days from this date.

Dated this 21st day of June, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 21, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [18]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES OF SALMON, etc.,

Respondent.

**Order Extending Time to and Including July 31,
1922, to File Record in Circuit Court of Ap-
peals.**

BE IT REMEMBERED that this matter came on
duly and regularly before this Court, and it appear-
ing to the Court that good cause has been shown why
the time for filing record on appeal with the Circuit
Court of Appeals should be extended;

NOW, THEREFORE, IT IS HEREBY OR-
DERED AND AJUDGED that the date and time
for filing the record on appeal herein with the Circuit
Court of Appeals for the Ninth Circuit, at San Fran-
cisco, California, be, and the same is hereby extended
to and including the 31st day of July, 1922.

Done in open court this 19th day of July, 1922.

EDWARD E. CUSHMAN,

Judge, U. S. District Court.

Approved:

KERR, McCORD & IVEY,

Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON, labeled in part
"Hypatia Brand Pink Salmon," shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent.

A. O. ANDERSON & COMPANY,

Claimant.

Petition for Writ of Error.

To the Honorable Edward E. Cushman, Judge of the
United States District Court for the Western Dis-
trict of Washington:

Comes now the libelant, by its attorneys, Thomas P. Revelle, United States Attorney, and Judson F. Falknor, Assistant United States Attorney, for the Western District of Washington, and respectfully shows that on the 24th day of June, 1922, final judgment was entered against your petitioner dismissing its libel against 1974 Cases Canned Salmon, labeled in

part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery.

Your petitioner, feeling itself aggrieved by said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided. [20]

WHEREFORE, the premises considered, your petitioner prays that a writ of error be issued and that an appeal in this behalf to the Circuit Court of Appeals aforesaid sitting in San Francisco, in said circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made staying all further proceedings until the determination of said writ of error by said Circuit Court of Appeals, and that a transcript of the record, papers and proceedings in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated this 24th day of June, 1922.

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

Received a copy of the within petition this 23d day of June, 1922.

KERR & McCORD,
Attorneys for Respondent and Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, Jun. 26, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch Deputy. [21]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON Labeled in
Part "Hypatia Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON COMPANY,

Claimant.

Assignments of Error.

Comes now the above-named libelant, the United States of America, by its attorneys, Thomas P. Revelle, United States Attorney, and Judson F. Falknor, Assistant United States Attorney, for the Western District of Washington, and in connection with its petition for writ of error in this case submitted and filed herewith, assigns the following errors which the libelant avers and says occurred in the proceedings and at the trial of the above-entitled cause in the above-entitled court, upon which it relies to reverse, set aside and correct the judgment and decree entered herein. It says that there is manifest error appearing upon the face of the records and in the proceedings in this:

I.

That the claimant at the close of the Government's evidence moved the court to direct the jury to return a verdict of "not guilty" on the ground that the Government had introduced no evidence which would justify the submission of the case to the jury, and that the Government had introduced no evidence tending to sustain the allegations of the libel, which motion [22] was granted by the Court, and to which ruling the libelant then and there duly excepted; which exception was by the Court allowed; and now the libelant assigns as error the ruling of the Court upon said motion.

II.

That the Court thereafter in accordance with the directed verdict of "not guilty" returned by the jury, entered a judgment against said libelant dismissing said libel, to which ruling and judgment the libelant then and there duly excepted; which exception was by the Court allowed; and now the libelant assigns as error the entering of such judgment against said libelant dismissing said libel.

As to each and every assignment or error as aforesaid libelant says that at the time of making the order or ruling of the Court complained of, the libelant duly asked and was allowed an exception to the ruling and the order of the Court.

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

Service of the foregoing assignments of error received and copy thereof admitted this 23d day of June, 1922.

KERR & McCORD,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON Labeled in
Part "Hypatia Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON COMPANY,
Claimant.

Order Allowing Writ of Error.

Now, on this 24th day of June, 1922, came the libelant by its attorney Thomas P. Revelle, United States Attorney for the Western District of Washington, and Judson F. Falknor, Assistant United States Attorney for said district, and filed herein and presented to the Court its petition praying for the

allowance of a writ of error intended to be urged by it, and praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises, and that an order be made staying all further proceedings until the determination of said writ of error by the said Circuit Court of Appeals;

NOW, on consideration of said petition and being fully advised in the premises, the Court does hereby allow the said writ of error:

AND IT IS HEREBY ORDERED that all further proceedings are hereby suspended herein until the determination of the said writ of error by the said Circuit Court of Appeals.

EDWARD E. CUSHMAN,

Judge, United States District Court for the Western District of Washington.

[Endorsed]: Filed in the United States District, Court, Western District of Washington, Northern Division, June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON Labeled in
Part "Hypatia Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery,

Respondent,

A. O. ANDERSON COMPANY,

Claimant.

Bill of Exceptions.

BE IT REMEMBERED that on the 20th day of June, 1922, the above-entitled cause came on regularly for trial before the Honorable Edward E. Cushman, Judge of the above-entitled court. The United States appeared by its District Attorney and the claimant A. O. Anderson Company appeared by its attorneys, Mr. E. S. McCord and Mr. Otto B. Rupp. Thereupon a jury was duly impaneled and sworn to try the cause. The following witnesses on behalf of the United States were then sworn and testified in substance as follows:

Testimony of E. A. McDonald, for Libelant.

E. A. McDONALD, having been sworn, testified as follows on behalf of the libelant:

That he is employed by the United States in the Bureau of Chemistry and has been so employed since

(Testimony of E. A. McDonald.)

1907, being stationed during that entire time in Seattle; that prior to his employment by the Government he was engaged in similar work for the State [25] of Washington in the capacity of State Food Commissioner. That he took an investigational sample, No. 22747, from the salmon forming the subject of the controversy, which said investigational sample consisted of 24 cans taken from 24 cases. This investigational sample was taken January 3, 1921; that an investigational sample is customarily taken by the Government to determine whether a final sample will be taken, that is, whether the first sample is sufficiently decomposed to warrant the taking of another sample; that the investigational sample is generally taken from the top of the pile or parcel but that they probably skip around so as to cover the whole pile. The 24 cans were taken from 24 cases from the top of the pile, one can from each case, so that the investigational sample represented samples from 24 cases. This investigational number was marked on the cans and the sample was taken to the United States Food and Drug Laboratory. That on January 5, 1921, on account of the quality of the first investigational sample, witness took what is known as a final sample; that he was very careful to cover the entire pile, to go into it very exhaustively, covering the top, going down on the sides to the lower tier and on the other side, judging largely by the parcel as to where it is located in the warehouse. That his aim was to get a representative sample of the entire pile. This final sample consisted of 192 cans from 192 cases. Witness

(Testimony of E. A. McDonald.)

put his hand in each case and picked out a can. If the can appeared to be a swell he didn't take that because that generally is eliminated in a commercial way. This final sample was given the number 10533-T and the cans were marked then with that number on them and were delivered to the Pure Food and Drug Laboratory at Seattle. That no further samples [26] were taken until after the seizure of the salmon. That after the seizure of the salmon what is known as a post seizure sample was taken in co-operation with the owner of the salmon or his representative. That this sample was taken under a court order which authorized both the claimant and witness to be there and take samples at the same time, which was done. Mr. Monroe was there representing the claimant. Witness and Mr. Monroe agreed which cases should be selected, and they selected 192 cases over the whole pile. These were representative cases. That in the interim between the taking of sample No. 10533-T and the taking of the post seizure sample the salmon was moved from one part of the warehouse to another and spread out over a larger territory, and that Mr. Monroe and witness, after looking it over decided that they would get the most representative sample from taking it entirely off the top, being careful that they did not take any from any case that had been opened before, so that the second 192 cans obtained in the post seizure sample represented cans from 192 cases that had not been opened before. That approximately 400 cases of salmon were opened and a can taken from each case; that between the time

(Testimony of E. A. McDonald.)

of the taking of the first sample of 192 cans and the second sample of 192 cans the pile had been spread over a larger area and that witness and Mr. Monroe, representing the claimant, agreed on which 192 cases would be selected for the post seizure sample, both witness and Monroe taking a can from each of the said 192 cases; that this post seizure sample was given the number I. S. 14049-T, and the cans were so marked and delivered to the laboratory at Seattle. [27]

On cross-examination witness testified as follows: Witness did not examine the salmon himself but just selected it. The post seizure sample of 192 cans was taken June 14, 1922. Each case was opened and one can was taken by witness from the case and one by Mr. Monroe side by side so that witness only took to make up the sample one can out of each case, examining only in the post seizure sample 192 cases; that these cans were taken from the top of the pile. That the witness and Monroe took the cans from the top of the pile because they knew that they would be the most representative. The pile was about eight cases high and in width 14 cases one way by 16 the other. Witness did not attempt to go into the interior of the pile but took it from the top. Witness knows that the pile was moved. The investigational sample was delivered to Mr. Higgins. The second sample was delivered to Mr. Hansen, and the post seizure sample was delivered to Mr. Dill. Witness did not take a receipt for them. They were all marked so that they could be identified.

(Testimony of E. A. McDonald.)

On redirect examination witness testified as follows: Witness makes the statement that the sample was taken entirely off the top of the pile; he refers to the post seizure sample. Referring to sample No. 10533-T where 192 cans were taken, these cans were taken not only from the top of the pile but along the sides and from the bottom tier. The taking of the 192 cans of the last sample from the top of the pile was done with the consent of the claimant represented by Mr. Monroe, who took the samples with witness. [28]

On recross-examination witness testified as follows: At the time of the taking of the first 192 cans sample No. 10533-T no one was present representing the claimant. At that time witness thought it wise in taking the samples to go down the sides of the pile on each side. Witness does not recall exactly from what part of the parcel the cases were taken, although following the usual rule he would say that 192 cans were taken from the side and top of the parcel one can out of each case.

Testimony of Arthur W. Hansen, for Libelant.

ARTHUR W. HANSEN was sworn and testified on behalf of the libelant as follows:

That he is in charge of the United States Food and Drug inspection station at Seattle in the employ of the United States Government; that he has been in charge of the local station since August 1, 1919; that the most important part of his business since that time has been to examine and analyze the contents of interstate shipments of food and drugs. (There-

(Testimony of Arthur W. Hansen.)

upon, claimant, admitted that witness was a qualified chemist.) That there was turned over to witness' department investigational sample No. 22747 consisting of 24 cans of pink salmon and was delivered for analysis to one H. G. Higgins, a Government chemist employed in witness' laboratory; that Higgins analyzed said sample and turned over to witness his official report. That Higgins is now in San Francisco but that witness has his report with him.

Thereupon, the following proceedings were had, to-wit: [29]

Q. Will you produce it, please?

A. (Witness produces paper.)

Mr. FALKNOR.—I offer this in evidence.

Mr. McCORD.—I object to the introduction of it as not the best of evidence, and as hearsay.

Mr. Higgins examined the salmon,—made the examination himself.

The COURT.—He can refresh his memory from the report but I don't understand it is original evidence.

Mr. FALKNOR.—It is a permanent record of the Department made by the chemist.

The WITNESS.—Yes.

The COURT.—I will sustain the objection.

Q. (Mr. FALKNOR.) Refreshing your recollection from this paper, I will ask you what the analysis from your department shows of these 24 cans of salmon.

Mr. McCORD.—I would like to ask you if you are basing your opinion upon what you see in that paper

(Testimony of Arthur W. Hansen.)

before you, or are you reaching your conclusion and testifying from what you know independent of that.

The WITNESS.—I personally recollect that Mr. Higgins examined the preliminary sample in this case, but the percentages and results of the analysis would be from this paper.

Mr. McCORD.—You have no independent recollection other than this statement or from what he told you.

The WITNESS.—I have the general recollection that his results warranted the collection of a final sample. [30]

Mr. McCORD.—I object to it.

The COURT.—I don't see any other way to get at it.

Objection overruled.

Q. (Mr. FALKNOR.) What did this examination show, Mr. Hansen as to the number of putrid and tainted cans in that 24 can lot?

Mr. McCORD.—This is the same thing that your Honor ruled out a moment ago.

The COURT.—Well, no. You made this record yourself?

Mr. McCORD.—No.

WITNESS.—No, sir, this record was made by Mr. Higgins and turned over to me.

The COURT.—Objection sustained.

Q. (Mr. FALKNOR.) Mr. Hansen, whatever the results were of this investigation sample, you considered the results sufficient to justify you taking a larger and more representative sample?

(Testimony of Arthur W. Hansen.)

Mr. McCORD.—I object to that as not proper.

The COURT.—Objection sustained. If they took the next sample, I don't see as it would make any difference what the reason was for it. [31]

That there was delivered to witness interstate sample No. I. S. 10533-T consisting of 192 cans; that 144 cans of said sample were examined by witness and 48 cans of said sample were preserved for subsequent analysis. Witness personally examined said 144 cans. That the sample was examined by the usual method followed in the commercial examination of salmon. Each can was opened and a careful note made as to odor and to the physical appearance of the same, it being a purely physical test. That of the 144 cans witness found from his examination a total of 28 putrid or tainted cans and 18 stale cans, that is, besides the 28 putrid cans there were 18 others that witness classified as stale, that is, showing initial decomposition. That a putrid can is one that by its odor is offensive to the sense of smell and contains rotten, decomposed salmon. That a stale can is one that clearly shows the beginning of decomposition but not in an advanced stage. That in counting his percentage witness did not count the stale cans. Witness found from his examination of said 144 cans 19.3 per cent of putrid, rotten or tainted cans. That witness has had practical experience in experimenting as to the result of canning salmon in different degrees of decomposition. That his experiments consisted of observations of a number of experiments conducted in the canneries and the laboratories, of salmon which immediately

(Testimony of Arthur W. Hansen.)

after being taken from the water was placed under observation and held under conditions closely approximating those obtaining in the salmon cannery. At regular intervals portions of the raw salmon were examined by chemical methods and the usual observation methods. Witness states that he arrived [32] at his conception of a tainted can or a putrid can or a stale can of salmon by actual experiments conducted on salmon. That decomposed salmon was canned and the cans were later cut and examined and witness found that when he canned rotten decomposed salmon he would get rotten decomposed salmon out of the can and would get the same kind of putrid salmon that he found in one of the cans classified as "putrid" in the sample referred to. That the finding of putrid or decomposed salmon in a can examined would indicate that putrid or decomposed salmon had been canned. That the 48 cans which were preserved for future analysis were examined on June 17, 1922, by witness and that there were also present at said examination the following named persons who also examined said 48 cans: Mr. Dill of the local laboratory, Dr. Johnson of the University of Washington, Dr. Hunter and Dr. Balcom of the Bureau of Chemistry at Washington, D. C., the last two mentioned persons having come from Washington to assist in the examination. That witness found from his examination of said 48 cans, eight of said cans, or 16.6 per cent to be putrid or tainted and one can to be stale. These 48 cans were also examined by the other persons present. Witness also examined post seizure sample No. I. S.

(Testimony of Arthur W. Hansen.)

14049-T consisting of 192 additional cans. This post seizure sample was delivered to witness by Mr. McDonald of the local laboratory. The post seizure sample was also analyzed on June 17, 1922, by witness and by the other chemists and experts heretofore mentioned. That from his examination of said 192 cans of said post seizure sample witness found 35 cans to be putrid or tainted and 12 additional cans stale or partly decomposed. [33] Recapitulating, witness stated that altogether he examined a total of 384 cans, of which he found 71 to be putrid or tainted, or 18.4 per cent putrid or tainted, and in addition found 31 cans, or 8 per cent, to be stale, making a total of stale and putrid cans of 26.4 per cent.

On cross-examination witness testified as follows: The only salmon which witness personally examined were the two parcels of 192 cans each, one taken in January, 1921, and the other taken in June, 1922. At the time of the examination of the last 192 can sample on June 17, 1922, there were present besides witness Mr. Dill of the local pure food laboratory, Dr. Johnson of the University of Washington, and Dr. Hunter and Dr. Balcom, both from the office of the Bureau of Chemistry at Washington, D. C. The cans were examined independently by each of the persons present. In the examination the cans were divided up into parcels of one dozen each, each man keeping his own record. Witness kept his record in twelves. Cans were poured into twelve receptacles around the table and each person went around one following the other

(Testimony of Arthur W. Hansen.)

and examined each receptacle independently. Of the first twelve cans examined by witness one was found putrid, one tainted and none stale. In the second parcel of twelve witness found one putrid, three tainted and no stale cans; in the third parcel of twelve witness found one putrid, one tainted and one stale can. In the fourth parcel of twelve witness found three putrid, no tainted, and one stale. In the fifth parcel of twelve witness found 1 putrid, two tainted and no stale cans. In the next parcel of 12 witness found no putrid, no tainted and no stale cans. In the seventh parcel of twelve witness found three putrid, [34] no tainted, and no stale cans. Referring to the seventh parcel of twelve, the remaining nine cans were just fair salmon, that is, it was not salmon that could be classed as either putrid, tainted or stale and was salmon that was marked under the rules and regulations of witness' department. In the next parcel of twelve witness found one putrid, four tainted and one stale can. In the ninth parcel of twelve witness found one putrid, no tainted and no stale can. In the tenth parcel of twelve witness found one putrid, one tainted and one stale can. In the eleventh parcel of twelve witness found no putrid, two tainted and no stale cans. In the twelfth parcel of twelve witness found no putrid, one tainted and two stale cans. In the thirteenth parcel of twelve witness found no putrid, two tainted and two stale cans. In the fourteenth parcel of twelve witness found one putrid, one tainted and one stale can. In the fifteenth parcel of twelve witness found no putrid, two tainted and two stale cans. In the six-

(Testimony of Arthur W. Hansen.)

teenth parcel of twelve witness found one putrid, one tainted, and one stale can. In the aggregate of this sample witness found 14 putrid, 21 tainted and 12 stale cans, 7.2 per cent putrid, 10.9 per cent tainted, and 6.2 per cent stale, so that witness found 18.2 per cent putrid and tainted cans. By a putrid can witness means one that has a decidedly offensive odor that one would recognize if he knew anything about salmon. Witness thinks anyone that examined it would know that it was bad. Witness does not include in his classification a group known as "slightly tainted." It is sometimes the case that one man might say a can was tainted and another might not. There is a little variation between [35] examiners. The odor from the tainted cans is the same as the putrid only not quite so pronounced. Witness could not say that an ordinary person could tell a tainted can. The difference between a tainted can and a stale can is a matter which each man has to determine for himself and which witness has determined by actual experience. Witness has a definite basis upon which he forms his classifications.

Thereupon the following proceedings were had:
[36]

Q. So far as either tainted cans or stale cans are concerned, or the putrid cans,—from your experience in the Bureau of Chemistry, I will ask you if there is any such a thing as poison in the eating of these cans that would cause death or cause sickness?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—Exception.

Q. (Mr. McCORD.) What have you to say about that?

A. I will have to admit that I have not heard of any experiments proving or disproving that question.

Q. And in your whole experience during the time you have been connected with the Bureau of Chemistry handling these food products, have you heard or know of any case where any bad result followed the eating of this tainted salmon?

Mr. FALKNOR.—We make the same objection, if your Honor please.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. I did hear of a case once; but I cannot prove any case, Mr. McCord.

Q. The fact of the matter is it is universally recognized by everybody that if one should eat this tainted salmon he would not suffer.

Q. I don't know that it is recognized. I have heard of one case.

Q. You never knew of that case?

Mr. FALKNOR.—Objected to as immaterial.

[37]

The COURT.—Objection overruled.

Q. (Mr. McCORD.) You never knew of a case, did you, Mr. Hansen?

A. I cannot prove a case, no sir.

Q. The only theory upon which you claim that this is not entitled to go into commerce is because it

(Testimony of Arthur W. Hansen.)

is decomposed or putrid? You are not contending here that it is injurious to human health, are you?

Mr. FALKNOR.—I object to the form of this question as to what we are contending. It is a question of law for the Court.

The COURT.—Objection sustained.

Mr. McCORD.—I will withdraw the question.

The salmon was examined like the ordinary salmon packer examines it or any other man engaged in the salmon trade, that is, by the sense of smell. The witness further stated that he did not examine the salmon in question in the capacity of a chemist, but merely examined it as the ordinary salmon packer examines it or any other man engaged in the salmon trade, by the smell. He stated that he did not think it was necessary to resort to chemical analysis. Witness does not think that anyone who has had experience could examine this parcel with the same skill and the same judgment as a man with chemical training. While witness does not mean to state that it is necessary for a man to go through college in order to learn to smell rotten canned salmon, still witness thinks it is necessary for any man to actually conduct experiments on the decomposition of salmon [38] in order to know what he is talking about and in order to arrive at a fair, just basis for judgment. In order for a man to form a just and fair conception of what should be called a tainted or putrid can, he should base that judgment upon actual experiments of decomposed salmon. The commercial buyer who has been spoken of does not necessarily know exactly what

(Testimony of Arthur W. Hansen.)

the contents are. The fact of having opened a lot of canned salmon does not give the information that a few carefully conducted experiments would give the examiner. Witness has examined any number of parcels of salmon that he considers perfect.

Thereupon the following proceedings were had:

Q. The point that I am getting at is this: The Bureau of Chemistry has arbitrarily fixed a standard for tainted goods as to what will be allowed to go into commerce and what will not be allowed to go into commerce? I mean by this that they have established in the case of salmon a standard that any parcel of salmon may be permitted to go into interstate commerce if the tainted cans or stale cans do not exceed ten per cent?

Mr. FALKNOR.—We object to that. We are not insisting upon any standard—

The COURT.—Objection overruled.

Mr. FALKNOR.—There has been no testimony of any such a theory.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. The Bureau of Chemistry does not think it necessary to have any tainted or putrid salmon in canned salmon packs, and it is a fact, however, that the Department has examined [39] parcels of salmon and found certain amounts of bad salmon in it, and for one reason or another has passed them as you say.

Q. (Mr. McCORD.) They have passed them, haven't they, Mr. Hansen, up to ten per cent?

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—The same objection.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. I believe that it is possible that they have passed them in the past because conditions were probably such that they just simply felt it to be unwise to proceed against it. That may be the case.

Mr. McCORD.—That was always predicated upon the theory that it was not injurious to health, wasn't it?

Mr. FALKNOR.—Same objection.

The COURT.—Objection overruled.

A. I don't believe it, Mr. McCord.

Q. (Mr. McCORD.) In other words, if this salmon was injurious to health and ten per cent of it was bad so as to kill people you know very well that the Bureau of Chemistry would not permit ten per cent of spoiled salmon to go into the trade?

Mr. FALKNOR.—Objected to as argumentative.

The COURT.—Objection sustained.

Q. Do you recall any particular instance of where the Department of Agriculture or the Bureau of Chemistry permitted salmon to go into the trade where there was ten per cent tainted cans? [40]

Mr. FALKNOR.—Objected to as immaterial, and upon the further ground that it is not proper cross-examination.

The COURT.—Objection overruled. Now, that is a simple direct question. He asked if you know of any case where it would be equal to ten per cent that would be allowed to go into the trade.

(Testimony of Arthur W. Hansen.)

A. I don't know of any cases. I might say that the Bureau of Chemistry would most decidedly object to any percentage of decomposition.

Q. I am asking you this question: Do you know of any canned salmon where the percentage of tainted cans was ten per cent or more that were examined and passed by the Bureau of Chemistry and allowed to go into the trade?

A. I don't recall any such a parcel.

Q. Do you recall a parcel of salmon known as the Myer Salmon in the city of Washington that was allowed to go into the trade when the percentage was ten per cent bad?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. Are you referring to a ten thousand case parcel that was finally put into fertilizer?

Q. (Mr. McCORD.) No, an eleven thousand case parcel that was passed into the trade.

A. No, I don't know anything about that, Mr. McCord.

Witness has resorted to chemical analysis in other cases to ascertain whether indole or skatole have developed in [41] the salmon. It is a practice of the department to examine only the stale cans for indole and where indole is found in the stale cans it has been classified as tainted. It is the practice in the Seattle laboratory not to examine the tainted cans for indole.

Thereupon the following proceedings were had:

(Testimony of Arthur W. Hansen.)

Q. (Mr. McCORD.) Mr. Hansen, there has been a great deal of salmon examined by you in the last two or three years in Seattle, hasn't there?

A. Yes.

Q. There has been comparatively few parcels examined where the percentage of bad salmon was nothing? In nearly every instance there has been some bad salmon, hasn't there?

Mr. FALKNOR.—Objected to as immaterial and not proper cross-examination.

The COURT.—Objection overruled.

A. I previously stated that I have seen a great many parcels of salmon that cut practically perfect.

Q. (Mr. McCORD.) You have seen a great many that did not cut perfect and you passed them into the trade?

Mr. FALKNOR.—He has been all over that; I object as repetition.

The COURT.—The witness seems very reluctant to give a direct answer to some of these questions. Objection overruled.

Mr. FALKNOR.—I think the witness has answered the questions fairly and candidly, if your Honor please.

Q. (Mr. McCORD.) I will ask you again if you have not passed into the trade salmon that ran from five to seven and eight per cent bad in Seattle in the last two or three years? [42]

Mr. FALKNOR.—I make the same objection.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

A. I don't recall of any parcels that ran as high as eight per cent that have been passed, Mr. McCord.

Q. (Mr. McCORD.) What is the highest per cent that you have passed?

A. I don't pass any personally. I might explain that—

Q. I understand that.

A. —I am working under the direction of the Bureau.

Q. Tell me what percentage of salmon, after you found to be bad in certain parcels seven or eight per cent, that has been released by the Bureau when you reported it to Washington,—put it that way.

A. Well, I think that a very good answer to that question would be about as follows: The Bureau of Chemistry has passed parcels that ran five or six per cent much against its wishes.

He stated that the highest percentage of adulterated salmon that had been passed by the Bureau of Chemistry into the trade was probably about six per cent.

Thereupon the following proceedings were had:

Q. (Mr. McCORD.) I will ask you this question: If six per cent is not a good reason for preventing salmon going into interstate commerce, I will ask you why twelve per cent would be unwise,—bearing in mind all the time that it is not dangerous to human health?

Mr. FALKNOR.—Objected to on the ground that there is [43] no testimony that it is not dangerous to human health. It is objected to also as argumentative.

(Testimony of Arthur W. Hansen.)

The COURT.—Objection sustained.

Mr. McCORD.—Your Honor does not sustain the objection on the ground that it is not testified that it is not dangerous to health?

Q. (Mr. McCORD.) I understood you to say a moment ago that this tainted salmon if one ate it would not injure health.

A. I beg your pardon.

Q. You said you never heard of a case.

The COURT.—He said that he thought he had heard of a case, but could not give the name.

Mr. McCORD.—The only reason I asked this question is I thought maybe I had misunderstood the witness.

Mr. FALKNOR.—I think you did misunderstand him.

The COURT.—Ask another question.

Q. (Mr. McCORD.) I will ask you again, Mr. Hansen, if you have any knowledge of anybody that has ever been injured from eating tainted salmon?

A. I have not.

Q. You know of none and in all of the experience you have had in the Department of Agriculture you never heard of but one instance and in that case you do not remember the name of the party?

A. I never heard of the matter being even investigated.

Q. If it was injurious to health then the Department would not allow six per cent to go into interstate commerce, would it?

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will sustain the objection to the question [44] in that form. If he is sufficiently acquainted with the practice and knows whether other food products that are injurious to health,—what the practice has been about condemning them in toto or allowing a percentage to go into the trade, he may state that. I sustain the objection to the question as framed.

Q. (Mr. McCORD.) From your knowledge and experience in the Bureau of Chemistry and investigations as to what is healthy or otherwise and what is proper to go into the trade, I will ask you whether they would permit under their rules and regulations a poisonous substance that was injurious to health to go into the trade?

Mr. FALKNOR.—I object to that as absolutely immaterial. We are concerned with one transaction. And it doesn't make any difference what happened at any other time. There is nothing in the Act about it being injurious to health.

The COURT.—I will overrule the objection. If there is an arbitrary rule that has been adopted about a percentage, the question whether it is so arbitrary as to be unenforceable would be admissible.

Mr. FALKNOR.—We object on the further ground that testimony already shows that it is not up to this witness to determine whether or not anything should be allowed to go into the trade.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

A. I am not in position to answer for the Bureau in this matter.

Q. (Mr. McCORD.) You decline to answer the question?

A. As far as I know the Bureau of Chemistry will not permit any food product which contains a poison or deleterious [45] product to go into commerce if it is within its power to prevent it.

Witness' department examines canned tomatoes.

Thereupon the following proceedings were had:

Q. And have passed into interstate commerce a lot of mould tomatoes, don't you?

Mr. FALKNOR.—Objected to as immaterial and not proper cross-examination. I asked a few simple questions about the quality of this particular salmon, not about tomatoes.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

Q. (Mr. McCORD.) What do you understand by the Howard method of examining tomato products?

Mr. FALKNOR.—Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

The COURT.—I have ruled on the question.

Q. (Mr. McCORD.) Go ahead and tell us about the Howard method of examining tomato products. What is it?

A. It is in brief a microscopic method whereby you get an approximate count or measure of the amount of mold bacteria and mold filament in the tomato by looking through a microscope at a definite amount of the tomato.

(Testimony of Arthur W. Hansen.)

Q. What per cent do you permit to go into the trade,—66 per cent, isn't it, of mold?

Mr. FALKNOR.—Objected to as immaterial unless there is shown some connection between that and——

The COURT.—Objection overruled. [46]

A. There is a standard; published standard.

Q. (Mr. McCORD.) They have this published standard of 66 per cent of mold,—could they permit 67?

A. 66 per cent, I believe it is.

Q. Now, in order to produce 66 per cent of mold as shown by these examinations, what would that percentage be in rotten tomatoes? Ten per cent exactly, wouldn't it?

A. I am not an expert in tomatoes.

Q. You know that 66 per cent,—that is the standard established,—necessarily assumes that about ten per cent,—or exactly ten per cent,—of bad tomatoes are permitted to go into the trade,—is that a fact?

Mr. FALKNOR.—Objected to as immaterial.

The COURT.—There has been a question all through the case about whether an arbitrary standard has been adopted. Objection overruled.

Mr. FALKNOR.—I want to insist again that there is nothing in the Government's case about any standard, about resorting to any rule or standard or regulation or anything else. Note an exception.

Q. (Mr. McCORD.) Can you answer the question?

A. I cannot answer it.

(Testimony of Arthur W. Hansen.)

Q. In reference to this standard of 66 per cent of mold, doesn't it necessarily mean or in fact mean that this is the equivalent of ten per cent of bad tomatoes?

A. I cannot answer that personally. I don't know, Mr. McCord. [47]

Testimony of Dr. Albert C. Hunter, for Libelant.

DR. ALBERT C. HUNTER, after being duly sworn, testified as follows on behalf of the libelant:

That witness is a bacteriologist in the United States Department of Agriculture, Bureau of Chemistry, and has occupied that position for approximately four years. (Thereupon, claimant admitted witness to be a qualified chemist.) That witness is in the employ of the Government and stationed at Washington, D. C. That on the 17th day of June, 1922, witness, together with Mr. Hansen, Mr. Dill, Dr. Balcom and Dr. Johnson, examined 48 cans of canned salmon represented by interstate number 10533-T. From his examination witness found eight of said 48 cans, or 16.7 per cent, to contain putrid or tainted salmon. In addition he found 18.7 per cent to be "off" or stale salmon. By "off" witness means in odor, that it is not good, normal salmon. Witness includes the stale cans in that group, so that besides the 16.7 per cent putrid and tainted salmon witness found in addition 18.7 per cent which was stale or off. Witness was also present on June 17, 1922, when he and the others mentioned examined the post seizure sample of 192 cans represented by interstate number 14049-T. From his examination of the 192 cans he found 39

(Testimony of Dr. Albert C. Hunter.)

cans, or 20.3 per cent to be putrid or tainted. In addition he found 38 cans, or 19.8 per cent which were stale or "off." In the aggregate he examined 240 cans and found 47 which were putrid or tainted and in addition found 47 which were stale or off cans. That during the canning seasons of 1919, 1920, and 1921, witness personally conducted experiments where the salmon were obtained from fish traps under his observation, held out of the water known lengths of [48] time and at regular intervals canned. Before they were canned bacteriological and chemical examination, as well as physical examination, was made. The cans were properly identified, referring back to the age of the fish and the conditions under which it was held, and those cans were later opened and examined. Through those experiments witness and his associates were able to correlate the condition of the canned fish with the condition of the raw fish on the cannery floor before canning. In these experiments he found that fish which was three or four days out of the water got into a bad condition. It was foul smelling, the gills were foul, the skin showed dry and cracking, the eyes were badly dissipated. It usually turned out considerably better in the can than the fish looked on the cannery floor, because they removed the gills and entrails and other foul smelling parts of the fish; that it didn't can up as badly. The fish that got into a very advanced stage of decomposition before canning produced what witness now calls "putrid," because the fish were so obviously rotten that there would be no mistaking that, when handled

(Testimony of Dr. Albert C. Hunter.)

and put in the cans. Witness states that from his examination of the salmon in question, the putrid and tainted condition of the fish indicated that the fish was decomposed and putrid at the time it was canned.

On cross-examination witness testified as follows: That he examined one 48 can and one 192 can parcel, both parcels being examined on June 17, 1922; that the 192 can parcel, which is number 14049-T, was examined prior to the examination of the 48 can parcel, number 10533-T. In the examination of the 48 can parcel it was divided up into four [49] groups of twelve cans each and the twelve pans set out on the table. Witness has no record of the examination of each dozen either with reference to the 48 can parcel or the 192 can parcel. Witness kept only the total record for each parcel. From the 48 can parcel witness found eight tainted cans and nine which he designated as "off" or stale, did not classify any as putrid. With reference to the 192 can parcel witness found six putrid cans, 33 tainted cans, and 38 cans which were "off" or stale, making a total of 39 cans putrid, tainted or stale, or a percentage of 20.3. In the stale cans the decomposition has not progressed to the extent that it is known as a tainted can. If fish is stale it will become tainted if left long enough, that is, before it is canned. After it is canned its condition does not change. When it is once canned its condition is fixed if it is properly processed. In witness' judgment none of the decomposition or staleness found in the salmon in question was the result of improper

(Testimony of Dr. Albert C. Hunter.)

processing. Processing means the cooking of the fish. Bacteria will develop under certain warm conditions. If salmon were shipped through the tropics one would be very apt to find tainted salmon which would develop in the can itself although the fish were not tainted when canned, provided there are living bacteria in the can and the can had not been properly processed. Witness states that the salmon in question could not have developed the taint found through any changes in atmospheric conditions or temperature because in such a case the cans would swell. Where a tainted condition is produced after canning through changes in temperature the can swells. Witness has carried on no definite experiments to determine that question with regard [50] to different temperatures. The experiments that witness made and which were referred to by him in his direct examination were carried on in 1919 on Puget Sound. Some of the fish were canned at Bellingham, some in Anacortes. In 1920 the work was done on the Columbia River at Astoria. In 1921 the experimental work was done in Seattle. The work in Seattle and Astoria was done personally by witness, and in 1919 the work was done under his supervision. From his experiments witness found that under ordinary conditions without ice on the cannery floor the longest that salmon could be kept out of water in good condition so that it would be safe to can it for human food was 48 hours. That between 48 and 72 hours the condition becomes objectionable. In his experiments with fish 72 hours old the condition varied. There would be some good ones and

(Testimony of Dr. Albert C. Hunter.)

some stale ones. Numerous factors enter into the result. Fish kept out of water three days if kept in a cool place might pass examination.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Now, you can tell the difference between tainted and stale fish.

A. Yes, sir. Sometimes it is difficult to figure a border-line can.

Q. There is a border line between tainted and stale?

A. In this particular lot there was. Those that we left were average quality. There was no mistaking the bad ones.

Q. So far as your observation goes you would say that 20 per cent of this is tainted or putrid salmon?

A. Yes, sir.

Q. In two thousand cases?

A. I believe I heard that from the record. [51]

Q. 20 per cent,—that would be 400 cases.

Mr. FALKNOR.—That would be a matter of computation.

Q. (Mr. McCORD.) Then the 1600 cases that were left were marketable salmon and fit for human consumption, in your judgment?

A. Yes, sir.

Q. How long have you been in the Bureau of Chemistry at Washington, D. C.?

A. Since April, 1918; a little over four years.

Q. Prior to that time where were you?

A. I came directly from college where I was doing graduate work and was employed by an oyster company in Providence, Rhode Island.

(Testimony of Dr. Albert C. Hunter.)

Q. You began your experimentation in the spring of 1919.

A. The preliminary work was in the winter of 1918 and the field work began in 1919, yes, sir.

Q. You examined a very large quantity of the salmon taken back from the packers, known as Army salmon?

A. I examined considerable of it.

Q. Your practice was to do this, wasn't it, Dr. Hunter: You would take one sample that might run 25 per cent bad salmon and you would draw another sample and that might run 15 per cent and you would draw another one,—an equal number of cans,—and it would run 5 per cent, and you would draw one that would be practically perfect, and you always averaged those up to determine, did you not, the quantity?

A. No, I never did. If you understand my position,—I was not an administrative officer. I had nothing to do with drawing the samples. If samples were submitted [52] to me with orders to make an examination, I examined the salmon and reported to the Chief of the Bureau my findings. That was my part in the affair.

Q. You don't know what he did?

A. No, sir.

Q. That is, you don't know definitely in each case?

A. No, sir.

Q. As a matter of fact, you know that you examined parcel after parcel to the extent of five parcels drawn from the same pack?

A. Yes, sir.

(Testimony of Dr. Albert C. Hunter.)

The witness stated further that he did not honestly know what the actual course of the Bureau was with regard to the averaging of the parcels and he further stated:

A. I honestly don't know. At the time I presented my figures I have heard that the Chief of the Bureau did those things. It is simply hearsay. I have no personal recollection of it.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Doctor, are you familiar with the handling of— I mean are you familiar with the custom and regulations under which tomato products are handled through the Bureau of Chemistry in interstate commerce?

A. No, sir.

Mr. FALKNOR.—I object to that as immaterial and not proper cross-examination and move that his answer be stricken.

The COURT.—Objection sustained. The jury is instructed to disregard the answer. [53]

Q. (Mr. McCORD.) Do you know the Howard method for the examination of tomato products, that prevails in the Department of Chemistry?

Mr. FALKNOR.—Same objection.

Mr. McCORD.—I am trying to show, if your Honor please, that they allow canned goods to go into the trade with ten per cent of decomposed and putrid.

The COURT.—Didn't you show that before lunch? Didn't you get an answer to that?

Mr. McCORD.—From this witness? No sir.

The COURT.—Objection overruled.

(Testimony of Dr. Albert C. Hunter.)

Mr. FALKNOR.—Exception, if your Honor please.

The COURT.—Allowed.

Q. (Mr. McCORD.) You are familiar with the Howard method for examination of tomato products, are you not?

A. No, sir. I know they use the method.

Q. You know what it is?

A. I know there is a method, yes?

Q. Do you know what it is?

A. I have never even read the instructions.

Q. It is published by your department, isn't it?

A. Yes, sir. I never have read the publication.

Q. You know what it is?

A. In a general way, yes.

Q. Just what Mr. Hansen said this morning?

A. A microscopic method, yes.

Q. A microscopic method is used, and that is for the testing of the mold or decomposed parts that went into the product, isn't it?

A. I have heard testimony to that effect, yes sir.

[54]

Q. The effect of it is that about ten per cent of the product is decomposed, necessarily, under that standard established by the Department, isn't it?

A. I don't know.

Mr. FALKNOR.—He has already testified he doesn't know anything about this method.

The COURT.—Well, you may make the statement. Objection overruled.

A. I know nothing about that at all.

(Testimony of Dr. Albert C. Hunter.)

Q. (Mr. McCORD.) You don't know anything about that at all? A. No.

Q. You never examined any tomatoes?

A. I never looked at canned tomatoes in my life, no sir.

Q. You did examine tomato catsup, didn't you?

A. For sterility, for bacterial growth. Never for molds.

The salmon in question was not tested for bacteria. Witness is certain without any such examination that the condition of the salmon at this time is due to the condition of the salmon at the time it was packed. The first few cans of salmon that witness examined in his experience he did examine for sterility and after he had had considerable experience in examining salmon both organoleptically, that is, by sense of smell, and sterility, he found that it was simply a waste of time to test for sterility. The small per cent of non-sterile cans witness found was negligible, and the bacteria that were present were such that it caused no spoilage in the product, and he stopped it. After the canning of the salmon there is no further spoilage unless the can swells. If the spores were left there and the can is not completely full it might cause a swell. Witness has no experimental experience to determine [55] whether the can would necessarily swell or not. He does not know whether the bacteria would grow in the can or not at all under any temperature. Referring to the cans that witness examined he is absolutely certain that it was rotten fish that

(Testimony of Dr. Albert C. Hunter.)

was put into the can. He bases his opinion on the experimental work he has done where he has produced these cans that they have never been able to duplicate in any other way and when salmon spoil subsequently to canning, it smells and looks differently. If bacteria remained in the fish after it was canned it would decompose and witness would be able to detect it. Witness has seen salmon which has spoiled in the cans but the cans in such cases swell. Witness has never tried to spoil salmon in a can and has never performed any experiments where the salmon spoiled in the can without the can swelling. Witness has seen people who could not detect a tainted can by sense of smell. Witness has seen people say that they didn't think cans of salmon were bad when witness thought they were putrid, although witness does not know the condition of their smelling apparatus. There is no division of belief as to classification of putrid cans, there is no mistake about them.

The witness stated that if the salmon were not properly cooked and the bacteria destroyed that spoilage might result, that might cause the can to swell, but not necessarily if the can was not entirely full of salmon or oil.

The witness further stated that anyone whose smelling organs were in good condition could easily detect the putrid cans but was not certain as to cans on the border line. [56]

Testimony of D. B. Dill, for Libellant.

D. B. DILL, after being duly sworn, testified as follows on behalf of the libellant:

Witness is a chemist employed by the Bureau of Chemistry, United States Department of Agriculture, and has been with that Bureau about four years. He is a graduate chemist, having done his undergraduate work at Occidental College at Los Angeles, graduated there in 1913 with the degree of Bachelor of Science. The following year he spent at Stanford University and graduated from there in 1914 with a degree of Master of Arts. He was head of the chemistry department at a technical high school in Salt Lake City for two years following his graduation from Stanford and the year following [57] he was principal of the Eldorado County high school in California. The year following that he was head of the chemistry department in the Palo Alto high school, California, and at the close of that year, in 1918, he entered the employ of the Bureau of Chemistry and is now stationed at Seattle. Has had experience in testing canned salmon organoleptically, that is, by a physical test rather than a chemical test. That he was present on June 17, 1922, when the 48 can lot No. 10533-T and the 192 can lot No. 14049-T were examined. Referring to the 48 can parcel witness found one of the cans to be putrid and seven cans to be tainted and two additional to be stale, making a percentage of putrid and tainted cans of 16.6 per cent. Referring to the 192 can lot No.

(Testimony of D. B. Dill.)

14049-T, he found twelve of these cans to be putrid, 24 cans tainted and ten cans stale, making a percentage of putrid and tainted cans of 18.7 per cent. In the aggregate he examined 240 cans, of which he found 44 cans to be putrid or tainted, making in the aggregate a percentage of putrid or tainted cans of 18.3 per cent. In addition he found in the aggregate twelve stale cans, or an additional percentage of five per cent.

Testimony of C. W. Johnson, for Libelant.

C. W. JOHNSON, after being duly sworn, testified as a witness on behalf of the libelant as follows:

Witness is one of the professors of chemistry at the University of Washington and has been dean of the College of Pharmacy at that institution for 19 years. Witness is a graduate chemist from the University of Michigan and since his graduation has been constantly connected with his profession. [58] He was present on June 17, 1922, when the 48-can parcel and the 192-can parcel were examined. Of the 48-can lot witness found two putrid, seven tainted and six stale cans, making a total percentage of putrid and tainted cans of 18.6 per cent. Referring to the 192-can lot witness found 15 putrid, 19 tainted and 13 stale cans, making a percentage of tainted and putrid cans of 17.6 per cent. In the aggregate witness examined 240 cans, his examination disclosing 17.9 per cent putrid or tainted and in addition thereto 7.9 per cent stale.

(Testimony of C. W. Johnson.)

On cross-examination witness testified as follows:

In the examination of the two parcels the cans were divided into lots of one dozen each. At the time of his examination witness kept the record of examination of each dozen lot but has since destroyed that record. Referring to the condition of the taint in the 48 cans, it was a decidedly unpleasant odor. It was decidedly tainted. Witness stated that he did not believe it was very difficult to tell whether a can was tainted or whether it was simply stale or off-smelling. In the examination of the dozens he found one set of twelve where there were no tainted or putrid cans. The balance witness would not say was an average merchantable pack, nor would he say it was a fair quality of salmon. The 192-can parcel ran about the same way as the 48-can lot. Witness was present during the entire examination of these two parcels. The percentage of putrid salmon of the 48-can lot was 4.1 per cent, and the percentage of putrid in the 192-can lot was 7.8 per cent. In the tainted cans the degree of rottenness was not as bad as in the putrid cans. Witness has been examining food products [59] for a good many years, being connected with the Food Department of the State of Washington. If tainted or putrid stale fish is being packed, it is witness' understanding that it is the effort of the state to prevent it and keep it off the market. There possibly is a very slight decomposition in every can of meat or fish product. Under proper conditions the decomposition increases the longer the animal remains dead. Witness

(Testimony of C. W. Johnson.)

presumes there is no such thing as absolute purity. If he or his department considers a parcel of food as bad an attempt is made to condemn it and keep it from the trade. The state has condemned hundreds of thousands of cases of canned salmon. Witness does not know as to whether or not one eating the salmon would suffer from it. As soon as the fish is dead decomposition sets in necessarily.

Thereupon the following proceedings were had:

Q. (Mr. McCORD.) Well, that is your general information, is it not, that it is not injurious to human health?

Mr. FALKNOR.—He said he didn't know, and his opinion is not material here.

Mr. McCORD.—That is all he can give.

Mr. FALKNOR.—It is not competent. He is not an expert on the effect it has on a human being, he does not claim to be a physician.

(Objection overruled.)

Mr. FALKNOR.—Exception.

A. Well, it is my opinion that any decomposed food is potentially a dangerous product.

Q. Yet, in your experience you never knew of any case that resulted in an injury to human health from eating it?

A. I have known of many cases of food poisoning.
[60]

Q. I mean salmon?

A. As a rule not traceable.

Q. I mean of salmon?

(Testimony of C. W. Johnson.)

A. No, I haven't any definite case of salmon.

Q. And how long did you say you had been in the Chemical Department of the State of Washington at the University?

A. At the University nineteen years.

Q. And in all the nineteen years, you have never known of a specific case of an injury to health from eating tainted salmon?

A. I have no definite knowledge of that; no, sir.
[61]

Testimony of R. Wilfred Balcom, for Libellant.

R. WILFRED BALCOM, after being duly sworn, testified as a witness on behalf of libellant as follows:

That he is a chemist connected with the Bureau of Chemistry and has been employed by the Government about fifteen years, being a graduate of the Massachusetts Institute of Technology. (Thereupon claimant conceded the qualifications of this witness.) That on June 17th, 1922, witness, in company with the other experts mentioned, examined the 48- and also the 192-can samples furnished, numbered respectively 10533-T and 14049-T. That these were examined by witness by a physical examination with reference to their degree of decomposition. In the 48-can sample witness found a total of 2 putrid and 7 tainted cans, making a percentage of putrid and tainted cans of 18.75 per cent. Besides these cans witness found 7 additional cans classified by him as off or stale cans, or a percentage of between 14 and 15 per cent of off or stale cans. Referring to the 192-

(Testimony of R. Wilfred Balcom.)

can sample, No. 14049-T, witness found from these cans a total of 39 that were either putrid or tainted, or 23.3 per cent. In addition, he found 29 cans, or approximately 15 per cent, which were off or stale cans. By a putrid can witness means one that stinks, simply an excessive degree of decomposition and one that is very rotten. By a tainted can he means one that has a perceptible odor, distinctly perceptible odor, objectionable odor of tainted or rotten flesh, being not quite so strong an odor as in a putrid can; that a putrid can is one that smells worse than a tainted can.

Witness stated that he participated in the experiments conducted by Dr. Hunter and Mr. Hansen to the extent [62] that this experimental work was originally planned by witness and the other laboratory co-operating, of which Dr. Hunter was a member. The chemical work for a time was done under witness' direct supervision. That this work was done on Puget Sound for the most part and the chemical work was done on the Sound as far as it was possible to do same in the field, the rest of the chemical work being done in Washington. Practically, the results of this experimental work were as follows: That there is a close parallel between the condition of the raw fish, as shown by a physical examination, that is, by odor, and to some extent appearance, and by chemical examinations, and the condition of the canned product when the can is opened. That fish that is in good condition when put in the can will be found in good condition when the can is opened.

(Testimony of R. Wilfred Balcom.)

That fish should not be held much longer, that is under ordinary conditions, than 48 hours after it is taken out of the water before it is packed at the cannery. Witness is convinced of the fact, from the results of these experiments, that the salmon he found in the putrid and tainted cans was putrid and tainted salmon when it was packed.

On cross-examination, witness testified as follows: That if it was bad when it was put in the can it remained bad; if it was good when it was put in the can but not properly cooked or processed something might happen. Spoilage might be due to improper processing and the leaving of spores of bacteria in the can. Witness stated that in his previous testimony he assumed that the processing was complete, as ordinarily carried out. That tainted salmon has a perceptible odor. That putrid salmon contains more rottenness. That witness thinks that anybody ought to be able to detect a putrid can but doesn't believe anyone could detect a tainted can though their smelling apparatus was all right. [63]

Thereupon the following proceedings were had:

Q. Didn't you so testify in the trial of the United States against 80 cases of salmon and United States against 1379 cases of salmon, in this court, some time ago? I will just ask you if you didn't testify that anyone could tell it?

Mr. FALKNOR.—I will ask that counsel read the question.

(Testimony of R. Wilfred Balcom.)

Q. (Mr. McCORD.) Did the Court ask you this question: "Let me ask a question: In this tainted or putrid classification, I understand that putrid is where the decomposition has progressed to such an extent that to an experienced person you determine it from the odor"? Your answer was: "Yes, and usually an ordinary person without experience can easily detect it as well." "The COURT.—And the stale or off salmon, how do you arrive at that? The WITNESS.—In the examination of these various parcels of salmon we find a certain number of cans which we class as tainted or putrid and also a certain other number in which the odor is not so strong. The COURT.—But they are passed on by the smell? The WITNESS.—By the smell, yes. If we don't get a definite odor of taint in those cans—some of those cans might be what I call a doubtful taint and I am not sure. To give them the benefit of the doubt, I put them in the off column," and so on. Didn't you so testify in answer to questions propounded to you by the Court— "Yes, and usually an ordinary person without experience can easily detect it as well". [64]

Mr. FALKNOR.—The question shows that it referred to putrid cans—the questions and answers which have been read. I object to the form of the question.

The COURT.—Overruled.

Q. (Mr. McCORD.) Didn't you so testify, doctor?

A. I don't recall. I presume, if it is in the record there, of course.

(Testimony of R. Wilfred Balcom.)

Q. That is a fact, isn't it, that anybody whose smelling apparatus is in good condition, a man of ordinary smell, could detect putrid cans, without any question?

A. I don't think there is any question about that; no, sir.

Q. Now, if the tainted cans are—if it is perceptible, that is, if it is not on the dividing line between the stale and slightly tainted, any person with ordinary experience could do that, couldn't they?

A. I think one could say that if he smells it at all, that ordinarily he would be able to detect the taint, provided there is something—there is nothing the matter with his sense of smell.

The witness testified that he had been for fourteen years connected with the Bureau of Chemistry and that he was unable to specify any particular instance of illness, sickness or death resulting from the eating of adulterated salmon like those examined by the witness in this question.

Thereupon the following proceedings were had:

Q. Now, Doctor, in the conduct of your business in the Bureau of Chemistry, you don't and can't undertake to literally [65] say that nothing shall go, in the way of food product, into interstate commerce, unless it is entirely free from decomposed matter, can you?

A. I don't believe that would be an administrative possibility.

Q. It would be a practical impossibility?

(Testimony of R. Wilfred Balcom.)

A. Yes.

Q. —to literally construe that law, wouldn't it?

A. I think so; yes, sir.

Q. Therefore, the Bureau of Chemistry, in recognition of the fact have made, without possibly fixing any definite standard—they have allowed and daily allow food products to go into interstate commerce that are more or less tainted or bad or defective cans, is that so?

A. They have to make some rules for administrative guidance, and of course realizing that it is useless to make or adopt rules for their guidance that cannot be upheld as a practical matter, and, necessarily, they have to adopt some rules of that kind.

Q. And a literal enforcement or attempted enforcement of the regulation preventing any food products with decomposed matter in them to go into commerce would practically destroy commerce, wouldn't it?

Mr. FALKNOR.—I think that is a matter of argument, and I object to it.

The COURT.—Well, it is partly fact and partly argument.

Objection overruled.

Q. (Mr. McCORD.) Isn't it, doctor?

A. I don't know. I am not competent to answer that, as to whether it would destroy commerce or not.

Q. Well, nevertheless, in view of human infirmities and the [66] infirmities attending the packing of food products, the Bureau of Chemistry has been com-

(Testimony of R. Wilfred Baleom.)

pelled to recognize that they must grant some leeway, haven't they?

A. Yes, and they have to take those things into consideration, necessarily; we all have to do that.

Q. In order to practically carry on the business?

A. Yes, sir.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Doctor, under one of the regulations of your department you forbid the passing into interstate commerce of any food product that has any deleterious or substance injurious to health, isn't that one of your regulations?

A. I think that is covered by the Food and Drugs Act, is it not?

Q. By your regulations, yes.

A. I presume we have regulations bearing on it, yes sir, that is, one provision of the Act where you have poison substances.

Q. Now, I will ask if your regulations haven't been so that as to canned tomatoes, rice, corn, salmon and things of that kind, you recognize that it is not injurious to human health and therefore you allow a certain percentage of bad cans to go into interstate commerce because it is not likely to hurt anybody?

A. No, sir; I don't think we allow them to go into interstate commerce because it is not likely to hurt anybody.

Q. You would not let them go if it would hurt them, would you

A. We would try our best to prevent it, yes, sir. [67]

(Testimony of R. Wilfred Balcom.)

Q. That is an answer to my question. Now, Doctor, why is it that your department has seemed to adopt an arbitrary standard of ten per cent in the past in the case of salmon—

Mr. FALKNOR.—Objected to as he has already testified that they didn't adopt any such standard.

The COURT.—I am not clear whether he has or not.

Objection overruled.

A. If you will permit me, I think I can make that point clear. When we first began the examination of this canned salmon in large quantities, there was such a large percentage of it on the market that was in very bad condition that merely as an administrative policy we had to adopt some rule as to where we should bring an action and where we should let the matter go—

Q. Yes.

A. —and for a time there was a certain limit, somewhere around ten per cent. That was several years ago; and the reasons for that—for the percentage being so high at that time, were various. I will mention perhaps two. One was that we didn't know so much about the business then as we do now, but the principal one was that there was such large quantities of salmon on the market that were so much worse than ten per cent, that we considered that the best we could do with our limited funds and personnel was to get those parcels off the market that were worse than ten per cent. If we succeeded in doing that at that time, we were doing mighty well. [68]

(Testimony of R. Wilfred Baleom.)

That the department never recognized the fact nor has ever admitted the fact or believed that this putrid or tainted salmon would not hurt anyone. They believed that it probably would not kill anyone, but that it might cause them digestive disturbances and all that.

Thereupon the following proceedings were had:

Q. Have you ever known of a case of injury to health, either seriously or temporarily, from the eating of tainted salmon?

A. No, sir; not of salmon.

Q. That is what I say, of salmon. Now, then, having no knowledge of any ill results following the eating of tainted salmon, then I will ask you upon what theory you can say that it is safe and proper to allow ten per cent of possibly bad salmon to go into interstate commerce and at the same time fifteen per cent ought not to be allowed to go?

Mr. FALKNOR.—I object to that as immaterial and not proper cross-examination.

The COURT.—Overruled if he has anything to add to what he has already said. He has spoken of it as an administrative measure. If there is anything more, you may state.

A. I do not hold that it is either safe or proper, and I don't believe the Bureau of Chemistry or the Department of Agriculture so holds, but at that time it was the best we could do—was to keep off the market the worst samples. At the present time we [69] are working on an entirely different basis.

Q. If I understand you correctly, then, you say that

(Testimony of R. Wilfred Balcom.)

the regulations of your department in a measure depend upon the exigencies and conditions?

A. They have to be, yes sir, to some extent.

Q. And in 1919 it was all right to ship this quality of salmon into the market, when it was ten per cent?

A. We didn't say it was all right.

Q. I say you permitted it to be done?

A. We held it was all wrong, but—

Q. Now you would not have the same rule?

A. No, sir; we don't.

Q. In other words, a parcel of salmon today you would not pass as you would have in 1919?

A. We would not be so lenient with, no sir.

Witness cannot say when the salmon in question was packed. Witness knows there is a method known as the Howard method for the examination of tomato products; that the method has been published in the department journal, and witness knows it is a microscopic method of examination but does not know the details of the method and has never used it. Doesn't know anything about it. Witness doesn't believe that he ever examined any canned tomatoes; doesn't recall that he ever did and certainly never used that method. That the salmon in question was not examined bacterially and no attempt was made to make such an examination.

Out of the 48-can lot, witness found 2 putrid cans, or a little over 4% of putrid cans. Out of the 192-can parcel he found 3 putrid cans and 36 tainted, making a total of 39 tainted or putrid, or about 1½% of putrid cans in the 192-can lot, with [70] an addi-

(Testimony of R. Wilfred Balcom.)

tional total of 19% tainted cans. These tainted cans represent varying degrees of taint, graduated from slight tainted to strongly tainted. By a slightly tainted can witness means one where the tainted odor of putrescent meat or fish is distinctly perceptible, and a tainted can is one where the odor is still more perceptible. The classification then graduates down to those cans recorded in the off column, some of which witness was [71] in doubt as to whether there was a tainted odor, with some of which he recorded as doubtful taints. Then going down still further would be the stale cans. Witness considered a doubtful taint a little worse than a stale, and these would be cans that he would mark or which he would call strong; the odor is not entirely that of fresh salmon.

On redirect examination, witness testified as follows: After the rush of work involved in the examination of the large quantity of salmon on the market several years ago was out of the way, the department began as its administrative policy to tighten up a little bit, and the basis now if they have any is about this, that they probably would not start an action in the court of any kind on a sample of salmon or parcel of salmon that showed less than around 5% of putrid and tainted cans. If it showed more than that they would probably begin action, but of course they realize in all matters that the ultimate standard, the tolerance, if it might be called that, is fixed by the court action and not by the department. The only reason that the percentage was ever fixed as

(Testimony of R. Wilfred Balcom.)

high as ten per cent was due entirely to the exigencies of the situation, that to condemn and destroy salmon that was 20% bad would have no effect whatever on the legitimate trade.

On recross-examination the witness testified as follows: That the regulations of the department in a measure have to depend upon the exigencies of the situation and the present conditions. That the department never said it was all right to ship salmon into the market which was less than 10% bad. That the department would not be lenient with the salmon now as it was in 1919. [72]

Thereupon the government offered in evidence and there was admitted in evidence Government's Exhibit No. 1 for identification, which was and is a chart recapitulating the testimony of the various Government witnesses with reference to the analysis of the salmon in question, which said chart was and is in words and figures as follows, to wit:

Government's Exhibit No. 1.

F. and D. No. 14262.

| | Putrid or | Tainted. | Stale. |
|--|-----------|----------|--------|
| A. W. Hansen, 384 cans from 384 cases | 71 cans | 31 cans | |
| | or 18.4% | or 8.0% | |
| C. W. Johnson, 240 cans from 240 cases | 43 cans | 19 cans | |
| | or 17.9% | or 7.9% | |

| | | |
|---------------------------------|----------|-----------|
| D. B. Dill, 240 cans from 240 | | |
| cases | 44 cans | 12 cans |
| | or 18.3% | or 5.0% |
| | Off | Including |
| | | Stale |
| A. C. Hunter, 240 cans from 240 | | |
| cases | 47 cans | 47 cans |
| | or 19.5% | or 19.5% |
| R. W. Balcom, 240 cans from 240 | | |
| cases | 48 cans | 36 cans |
| | or 20.0% | or 15.0% |

Average of all Analysts:—

| | |
|-----------------------------|-------|
| Tainted or Putrid | 18.8% |
| Stale or off | 10.7% |

[73]

Thereupon the following proceedings were had:

Mr. FALKNOR.—And, for the sake of the record, I understand also that counsel will concede that the salmon seized under the process of the Court was in the same condition as it was when it left Alaska.

Mr. McCORD.—Yes.

Thereupon further proceedings were had, as follows:

Mr. McCORD.—Your Honor, I would like to make a motion in this case, if you will excuse the jury a little while.

The COURT.—The jury may retire. (Jury retired.)

Mr. McCORD.—At this time, your Honor, we desire to move for a nonsuit and dismissal of this action, for the reason that there is no evidence that will justify the Court in permitting the matter to go to

the jury; there is no evidence that would justify the entry of a judgment of forfeiture in this case.

(Arguments by respective counsel.)

The COURT.—I think, in the practice in this court, that a motion of this kind or a motion to take the case from the jury as a matter of law, has customarily been a motion for an instructed verdict. A motion for nonsuit I think is state practice, and under the conformity statute it is a proper motion, I take it.

Mr. McCORD.—We are perfectly willing that it be amended to be for an instructed verdict, your Honor.

The COURT.—Well, then you announce at this time that you have no evidence to introduce on behalf of the de- [74] fendant and change your motion to a motion for an instructed verdict?

Mr. McCORD.—Yes.

The COURT.—The record may so show.

There is little that occurs to me to add to what is said in the opinion of this Court in the other case. As to the meaning of the statutory words, I find nothing in this case or in the argument to change my view expressed therein.

I am convinced that under the showing made here there would be nothing to warrant the Court in inferring or acting on the assumption that there was anything in doubt regarding the fairness of the samples taken, about which testimony has been given in this case, but, even so, I see no application either of the candy case or the syrup case or the oyster case to this. In the matter of the candy and in the matter

of the syrup and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground, where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not sampled and not tested, would likewise contain a certain amount of impurity and render them unfit for [75] food under this law. So in the case of the syrup, where it was labelled "Maple" syrup, the cupidity of the manufacturer having induced him to label as maple syrup certain portions of a shipment that were not in fact maple syrup, the jury would be warranted in applying what they knew about human nature—the doctrine of if false in one, false in all; that if the seller of the maple syrup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labelled but not sampled he was likewise cheating and defrauding the public by the misbranding of those. I am not entirely clear about the candy case, but I take it that that comes under the same rule.

Under the Government's own theory, the salmon were rotten before they were put in the cans. The individual fish being caught and transported to the cannery and held awaiting canning in the cannery, are

subjected to different conditions, one fish is kept out of water longer than another before it is canned.

I am convinced that the rule that obtains, that is adopted by the Department, has grown out of the inconvenience and impractical nature of the problem of sampling each can. The expense of cutting open the cans and recanning the pure fish is so out of all proportion to the value of the product after it is canned, that it becomes impracticable to do so. You cannot test all the cans without destroying all the product tested, and, therefore, they have adopted this rule, but it does not [76] change the meaning of the language in the statute.

I still adhere to the view that the "article" of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent or twenty per cent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by

those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses, have discarded and found impure practically the same percentage of salmon that those chemically testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

I do not say that the Department, after investigation, where the product was in bulk, where you could [77] treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that “Every one has to eat his peck of dirt sometime”—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find ten per cent or twenty per cent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff call the jury in.

Mr. FALKNOR.—I would like to have an exception noted.

The COURT.—Exception allowed.

The jury here returned into the courtroom, whereupon the following proceedings were had:

The COURT.—Let the record show the jury are all present.

Gentlemen, the Court has decided this case, as a matter of law, and the verdict as prepared under the direction of the Court reads as follows: "We, the jury [78] in the above-entitled cause, find the respondent 1974 cases canned salmon labelled in part 'Hypatia Brand Pink Salmon' not guilty as charged in the libel of information filed herein, being instructed by the Court so to do." The bailiff will hand the verdict to the jury, and if one of your number will sign it as foreman, I will then receive the verdict. Mr. Potts may sign the verdict.

This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the Court ruled that that does not apply; that it applies to bulk articles where there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the Court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating separate cans of salmon as one thing.

So gentlemen, listen to your verdict as it has been prepared under the direction of the Court: "We, the jury in the above-entitled cause, find the respondent 1974 cases canned salmon labelled in part 'Hypatia Brand Pink Salmon' not guilty as charged in the libel of information filed herein, being instructed by the Court so to do. W. G. Potts, Foreman". Gentlemen, do you say one and all this is your verdict? It will be received as [79] your verdict and filed in the case.

You are discharged from further consideration of the case and excused until to-morrow at two o'clock.
[80]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Edward E. Cushman, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, before whom the above-entitled cause was tried, DO HEREBY CERTIFY that the matters and proceedings set forth in the foregoing bill of exceptions are matters and proceedings which occurred on the trial of said cause, and the same hereby are made part of the record herein; counsel for the respective parties hereto being present and concurring herein.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of July, 1922, at Seattle, in said District.

EDWARD E. CUSHMAN,

Judge.

O. K.—KERR, McCORD & IVEY,

Attorneys for Claimant.

Received a copy of the within proposed bill of exceptions, this 7th day of July, 1922.

KERR, McCORD & IVEY,

Attorneys for Respondent and Claimant.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, July 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [81]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES OF SALMON, etc.,

Respondent.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit:

1. Libel of information.
2. Praecipe for monition and attachment.
3. Monition and attachment and Marshal's return thereon.
4. Claim of A. O. Anderson & Co.
5. Answer of claimant A. O. Anderson & Co.
6. Demand for jury.
7. Verdict.
8. Decree.
9. Order extending time to file bill of exceptions.
10. Order extending time to file record in Circuit Court of Appeals.
11. Petition for writ of error.
12. Assignment of errors. [82]
13. Order allowing writ of error.
14. Admission of service.
15. Bill of exceptions.
16. This praecipe.

Dated at Seattle this 19th day of July, 1922.

THOS. P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Assistant United States Attorney.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

THOS. P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Assistant United States Attorney.

We hereby acknowledge service of a copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

Dated July 19, 1922.

KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [83]

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES CANNED SALMON Labelled in Part
"Hypatia" Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery.
A. O. ANDERSON COMPANY,
Claimant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington, ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 83, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [84]

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making
record, certificate or return, 183 folios at
15¢\$27.45

| | |
|--|---------|
| Certificate of Clerk to transcript of record, 4 folios at 15¢ | .60 |
| Seal to said certificate..... | .20 |
| | <hr/> |
| Total | \$28.25 |

I hereby certify that the above cost for preparing and certifying record, amounting to \$28.25 will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending September 30, 1922.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation and original acceptance of service of citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 22d day of July, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington. [85]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

1974 CASES CANNED SALMON Labeled in Part
“Hypatia” Brand Pink Salmon” Shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent in Error,

A. O. ANDERSON COMPANY,

Claimant.

Writ of Error.

The United States of America,—ss.

The President of the United States to the Honorable
EDWARD E. CUSHMAN, Judge of the
United States District Court for the Western Dis-
trict of Washington, Northern Division, and to
said Court, GREETING:

Because in the records and proceedings as also in
the rendition of judgment in the above-entitled cause
which are in the said district court before you between
the United States of America as libelant, and 1974
Cases Canned Salmon Labeled in Part “Hypatia
Brand Pink Salmon” Shipped by Alaska Herring &
Sardine Co. Cannery as respondent, and A. O. Ander-
son Company as claimant, a manifest error hath hap-
pened to the great damage of the said libelant, the
United States of America, as by its complaint appears,

and we being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for [86] the Ninth Circuit, together with this writ, so that you may have the same in the city of San Francisco, State of California, where said court is sitting, within thirty (30) days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 24th day of June, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed this day of, 1922, after plaintiff in error had filed with the clerk of this court with their petition for a writ of error their assignments of error.

.....,

Judge of the United States District Court for the District and Division Aforesaid.

Copy of the within writ of error received and acknowledged this day of, 1922.

.....,

Attorneys for Claimant. [87]

[Endorsed]: No. . . . In the Circuit Court of Appeals of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon," etc., Respondent in Error, A. O. Anderson Company, Claimant. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [88]



In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5829.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

1974 CASES CANNED SALMON Labeled in Part
"Hypatia" Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery,
Respondent in Error.

A. O. ANDERSON COMPANY,

Claimant.

Citation on Writ of Error.

To 1974 Cases Canned Salmon Labeled in Part "Hy-
patia Brand Pink Salmon" Shipped by Alaska
Herring & Sardine Co. Cannery, and A. O. An-
derson Company, Claimant.

YOU ARE HEREBY cited and admonished to be
and appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit to be holden
at the city of San Francisco, State of California,
within thirty (30) days from the date hereof, pursu-
ant to a writ of error filed in the Clerk's office of
the District Court of the United States for the West-
ern District of Washington, Northern Division,
wherein the United States of America is plaintiff in
error, and 1974 Cases Canned Salmon Labeled in
Part "Hypatia Brand Pink Salmon" Shipped by
Alaska Herring & Sardine Co. Cannery is respondent
in error, and A. O. Anderson Company is claimant,
to show cause, if any there be, why the judgment
rendered against the said plaintiff in error, as in the
said writ of error mentioned, should not be corrected,
and why speedy justice should not be done the par-
ties in that behalf. [89]

WITNESS the Honorable WILLIAM HOW-
ARD TAFT, Chief Justice of the United States of
America, this 24th day of June, 1922.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the
Western District of Washington.

Copy of the within citation on writ of error received and due service of the same acknowledged on this 26th day of June, 1922.

KERR, McCORD & IVEY,

Attorneys for Claimant. [90]

[Endorsed]: No. In the Circuit Court of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery, Respondent in Error, A. O. Anderson Company, Claimant. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [91]

[Endorsed]: No. 3899. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. A. O. Andersen Company, a Corporation, Claimant of 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska Herring & Sardine Company Cannery, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 27, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States District Court, Western District of
Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES OF SALMON, etc.,

Respondent.

**Order Extending Time to and Including July 31,
1922, to File Record and Docket Cause.**

BE IT REMEMBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended,

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby extended to and including the 31st day of July, 1922.

Done in open court this 19th day of July, 1922.

EDWARD E. CUSHMAN,

Judge U. S. District Court.

Approved:

KERR, McCORD & IVEY,

Attorneys for Claimant.

[Endorsed]: No. 5829. In the District Court of the United States for the Western District of Washington, Northern Division. United States vs. 1974 cs. Salmon. Order Extending Time for Filing Record in C. C. of A. Filed in the United States District Court, Western District of Washington, Northern Division. July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

No. 3899. United States Circuit Court of Appeals for the Ninth Circuit. Order under Subdivision 1 of Rule 16 Enlarging Time to and including July 31, 1922, to File Record and Docket Cause. Filed July 27, 1922. F. D. Monckton, Clerk.

